INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and Regulation involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:	
Baughman v. *Green*, 229 F. 2d 33	7, 9
Blackmon v. *Lee*, 205 F. 2d 13	11
Busby v. *Electric Utilities Employees Union*, 323 U. S. 72	8
Cobbledick v. *United States*, 309 U. S. 323	7
Devine v. *Campbell*, 194 F. 2d 876, certiorari denied, 344 U. S. 826	7
Ellis v. *Interstate Commerce Commission*, 237 U. S. 434	7
Green v. *Baughman*, 243 F. 2d 610	11
Havemeyer v. *Iowa Company*, 3 Wall. 294	8
Mulligan v. *Dunlap*, 108 F. Supp. 296, reversed on other grounds, *sub nom. Mulligan* v. *Andrews*, 211 F. 2d 28	10
United States v. *Worley*, 281 U. S. 339	8
Williams v. *Cravens*, 210 F. 2d 874, certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U. S. 819	7, 9
Statutes and Regulation:	
Communications Act, 48 Stat. 1103, 47 U. S. C. 605, Section 605	5
Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, Section 14	2, 4, 9, 10
12 F. R. 2855, as amended, 5 C. F. R. 22.2	3
Miscellaneous:	
Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), § 154	8

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 495

JOHN T. DALY, PETITIONER

v.

JOSEPH F. FINNEGAN, DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE, L. E. EADY, DIRECTOR OF ADMINISTRATIVE MANAGEMENT, FEDERAL MEDIATION AND CONCILIATION SERVICE, PHILIP YOUNG, CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court for the District of Columbia (R. 50–52)[1] and its order denying both parties' motions for summary judgment and remanding the case to the Civil Service Commission for a new hearing (R. 58–59) are not reported. The opinion of the United States Court of Appeals for the

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[1] Record references are to the joint appendix in the Court of Appeals which is on file in this Court.

District of Columbia Circuit (Pet. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (Pet. 1a). The petition for a writ of certiorari was filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner's dismissal from his federal position was accomplished with full observance of his substantive and procedural rights as a classified civil service employee with the status of a veterans' preference eligible.

STATUTE AND REGULATION INVOLVED

Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, provides in relevant part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (ex-

cept where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *.

12 F. R. 2855, as amended, 5 C. F. R. 22.2, provides in relevant part:

> * * * No employee covered by the regulations in this part shall be discharged, suspended for more than thirty (30) days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the employee whose discharge, suspension for more than thirty (30) days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty (30) days advance written notice stating any and all reasons, specifically and in detail, for any such proposed action. * * *

STATEMENT

On September 10, 1952, the Federal Mediation and Conciliation Service served petitioner, a Commissioner of Conciliation, Grade GS–13, with a letter of charges,

advising him of his proposed removal for cause (R. 9–12). As the basis for "the proposed adverse action," the letter set out three independent charges. Charge 1, containing four specifications, related to dereliction of duty, failure to service an assigned case, and the giving of false information (R. 9–10).[2] Charge 2 related to a habit of intemperance which was seriously interfering with petitioner's work and in which a specific instance of intoxication on duty and a conversation with his superior about his intemperance were alleged (R. 10). Charge 3, containing three specifications, related to the disregarding of instructions by petitioner, being unavailable for assignments, and disregarding the case-reporting practices of the Service (R. 10–11).

Petitioner was advised that his proposed removal was being taken in accordance with the provisions of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863; and he was informed of his right to answer the charges and submit supporting affidavits or evidence (R. 11).

In his response, petitioner did not deny any of the charges, but pleaded "extenuating circumstances" (R.

[2] It was specifically alleged: That on April 3, 1952, petitioner could not be found by the Regional Director in Philadelphia (where petitioner was then stationed) when needed to work on cases assigned to him; that in telephone conversations with the Regional Director on April 3, 1952, at 1:30 p. m. and 3:15 p. m., petitioner falsely stated that he was meeting with persons involved in his assigned cases; and that at 5:30 p. m. petitioner personally reported to the Regional Director and falsely stated that he had claimed only "contact" with the parties and, when confronted with proof that he had no such contact, did not explain his actions for the day (R. 9–10).

12–13). The Mediation and Conciliation Service thereafter rendered its "adverse decision", discharging petitioner effective November 14, 1952, and advising him of his right as a veterans' preference eligible to appeal to the Civil Service Commission (R. 14).

On appeal to the Commission, petitioner, for the first time, denied the charges (R. 15–17). The Chief Law Officer of the Civil Service Commission, after conducting an independent field investigation into the allegations, and, after according petitioner a personal hearing at which he was represented by counsel of his own choice, concluded that (R. 47):

> On the weight of all the evidence as to the merits of the case, it is concluded that the charges are sustained; that the discharge was for such cause as will promote the efficiency of the service within the meaning of Section 14; and that the personnel action was not arbitrary, unreasonable or capricious.

The decision was affirmed by the Commission (R. 18–19), and rehearing was denied (R. 21). Petitioner then brought this action for declaratory judgment and mandatory reinstatement, complaining that the charges were not sufficiently specific and were unsupported by evidence, that he had been denied a fair hearing because of prejudgment and that, in support of the first charge, evidence had been relied upon which violated Section 605 of the Communications Act, 48 Stat. 1103, 47 U. S. C. 605 (R. 1–9). Holding

that the disputed evidence[3] was inadmissible in the administrative proceeding, the District Court denied cross-motions for summary judgment and remanded the case to the Civil Service Commission for reconsideration without such evidence (R. 58–59).

The Court of Appeals reversed. Without passing upon the propriety of the disputed evidence, the court unanimously held that there was sufficient other evidence in the first charge, as well as the two other independent charges, which were valid and sufficient to sustain the dismissal (Pet. 1a–4a). Accordingly, the case was remanded to the District Court with instructions to grant the Government's motion for summary judgment (Pet. 4a).[4]

ARGUMENT

The Court of Appeals properly declined to pass judgment upon the legality of certain disputed evidence which related only to a portion of one charge of misconduct against petitioner since, as the record fully demonstrated, there was sufficient evidence on that charge, as well as other independent charges of

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[3] This evidence consisted of a transcription of the telephone conversation at 3:15 p. m. on April 3, 1952, between petitioner and the Regional Director, taken by the Regional Director's secretary who had been directed by him to listen to the conversation on an extension (R. 30).

[4] The court also denied petitioner's motion to dismiss the appeal as premature, stating that the District Court's order had "completely and finally disposed of the case in the District Court, and we do not see how the Government could obtain a review of the order except by an appeal from it at this time" (Pet. 4a). Petitioner does not question this ruling. See *Cobbledick* v. *United States*, 309 U. S. 323, 330; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434.

misconduct, upon which to sustain petitioner's dismissal. Petitioner's attempt to have this Court determine the legal propriety of the disputed evidence, when any such determination is wholly unnecessary to the disposition of the case, is contrary to this Court's settled review practice. Petitioner's allegations as to other defects in his dismissal are without substance and establish no basis for further review by this Court.

1. It is well settled that where one of several independent charges against a federal employee is held invalid, the employee's dismissal must be sustained so long as the remainder is sufficient. *Baughman* v. *Green*, 229 F. 2d 33 (C. A. D. C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.), certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U. S. 819; *Deviny* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826. This principle was properly applied by the Court of Appeals in the instant case, since, at the most, the disputed evidence related only to a portion of one charge.

There were three charges with various allegations against petitioner. The first charge alleged specifically that (*a*) on the morning of April 3, 1952, petitioner could not be found by the Regional Director (Holbrook) "when you were needed to service the Food Fair-A. & P. Stores situation" assigned to him; (*b*) at 1:30 p. m. that day, petitioner falsely informed the Regional Director that he was meeting with the parties involved in the Food Fair case; (*c*) at 3:15 p. m. that day, petitioner telephoned the Regional

Director and falsely informed him that he was meeting a representative of the A. & P. Stores; and (*d*) when petitioner personally reported to the Regional Director at 5:30 p. m., he "compounded [his] falsification" by stating that he had claimed only "contact" with the parties and, upon presentation of proof that he had no such contact, he could not explain his actions for the day (R. 9–10).

The disputed evidence, *i. e.*, the transcription by Holbrook's secretary of the telephone conversation at 3:15 p. m. on April 3, 1952, is relevant, as the court below recognized, only to charge 1 (c)—that petitioner made false representations during that conversation. The transcription is immaterial to the rest of the first charge and, of course, to the second and third charges, which alleged intemperance, disregarding instructions, being arbitrarily unavailable for assignments, and disregarding case-reporting practices. Having ample independent grounds upon which to sustain petitioner's dismissal, the Court of Appeals thus found it unnecessary to determine whether the disputed evidence was or was not properly considered. Petitioner's insistence that this Court should resolve the issue, when, in these circumstances, it is unnecessary to the decision of the case, and is only of academic importance, is contrary to this Court's settled principles governing review. Cf. *Busby* v. *Electric Utilities Employees Union*, 323 U. S. 72; *United States* v. *Worley*, 281 U. S. 339; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303–304; see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), § 154.

2. Nor is there any substance to petitioner's assertions that his personnel action had been "prejudged", or that the procedural requirements of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, had not been properly observed.

(*a*) Petitioner's assertion of prejudgment apparently rests chiefly on the language of the letter of charges of September 10, 1952 (R. 9–12). But that letter, merely listing the charges against petitioner and notifying him of "proposed adverse action" only in the event of unsatisfactory answers or a failure to respond, clearly meets the requirement of statute and regulation. *Supra*, pp. 2–3.

(*b*) *Alleged procedural defects:*

(1) Petitioner complains that the charges were not sufficiently specific (Pet. 20). The first charge deals with the particular events of April 3, 1952, when petitioner allegedly was unavailable to handle cases assigned to him and misrepresented his whereabouts to the Regional Director. The second charge alleges a specific instance of intoxication on duty and a conversation with his superior about petitioner's intemperance. The third charge alleges a specific arbitrary tardiness and refers to omissions and delays in reporting cases of which petitioner had been apprised in a conversation of a certain day. These charges were sufficient because "in the light of all the circumstances, they furnished [petitioner] with sufficient information to prepare his defense". *Williams* v. *Cravens*, 210 F. 2d 874, 876 (C. A. D. C.), certiorari denied *sub nom. Williams* v. *Robbins*, 348 U. S. 819; see also *Baughman* v. *Green*, 229 F. 2d 33, 34

(C. A. D. C.); *Mulligan* v. *Dunlap*, 108 F. Supp. 296 (D. D. C.), reversed on other grounds, *sub nom. Mulligan* v. *Andrews*, 211 F. 2d 28 (C. A. D. C.).

Petitioner's reply to the charges did not deny or question them in any way, but merely pleaded "extenuating circumstances" (R. 13). Upon such a reply, the employing agency's decision to dismiss was entirely justified. Petitioner then appealed to the Civil Service Commission where, for the first time, he denied the charges (R. 15–17); however, the Commission held them to be valid and amply supported by the evidence (R. 18–19).*

(2) Equally without merit is petitioner's assertion that his dismissal was defective in that there had been a failure to comply with the requirement of Section 14 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C. 863, that removal action against a preference eligible employee must be "for reasons given in writing." The letter of dismissal of November 14, 1952, expressly stated that "[b]ased on the charges furnished you September 10, 1952, you will be separated from your position * * *" (R. 14). This procedure, which, by direct reference, fully apprised petitioner of the reasons for his dismissal was a sufficient state-

* As to the specificity of the charges, the Chief Law Officer of the Civil Service Commission concluded (R. 43):

> The letter of proposed action and its contents has been reviewed and it is found that the reasons stated therein are specific and in sufficient detail so that the appellant was in a position to clearly understand the particular offenses charged against him. Accordingly, he was not prejudiced in submitting his defense and the notice is not defective in this connection.

ment of the reasons for his discharge, *Green* v. *Baughman*, 243 F. 2d 610 (C. A. D. C.), and "complied in all substance with Section 14." *Blackmon* v. *Lee*, 205 F. 2d 13, 14 (C. A. D. C.).

(3) Petitioner's assertion (Pet. 16) that the Chief Law Officer of the Civil Service Commission "enlarged or added new charges to the charges of September 10, 1952" is frivolous. In his recommended decision, the Chief Law Officer listed verbatim the very charges contained in the letter of September 10, 1952, and, after an analysis of all the evidence that had been compiled in the course of the Commission's independent investigation into those charges, concluded that "[o]n the weight of all the evidence * * * the charges are sustained" (R. 47).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1957.